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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-476

FLORIDA POWER & LIGHT COMPANY, *Petitioner*,

v.

GAINESVILLE UTILITIES DEPARTMENT AND CITY OF GAINESVILLE, FLORIDA, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Florida Power & Light Company, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals, reported at 573 F.2d 292 (5th Cir. 1978), appears in Appendix A. The order of the Court of Appeals amending its prior opinion and denying rehearing en banc, which is not yet reported, appears in Appendix B. The final judg-

ment of the United States District Court for the Middle District of Florida, which has not been reported, appears in Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 1978. The order of the Court of Appeals denying a timely motion for rehearing en banc was entered on July 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The mandate of the Court of Appeals has been stayed pending this Court's action on this Petition, as provided in Rule 41(b), Federal Rules of Appellate Procedure.

QUESTIONS PRESENTED

1. Whether the action of the Court of Appeals in rejecting a jury's special verdict and the District Court's denial of judgment n.o.v. and directing a finding of conspiracy in a case in which the evidence of the alleged conspiracy is admittedly ambiguous, and in which the jury's assessment of motive and intent is supported by substantial testimonial and other evidence, so exceeded the proper limits of appellate review as to deny petitioner its constitutional right to trial by jury.

2. Whether pursuit of similar business practices by two public utilities operating in the same state, together with evidence of coordination which even the Court of Appeals found to be ambiguous in part, permits an appellate court to overturn a jury's special verdict and to direct the entry of a judgment that the two utilities have conspired to divide markets in violation of the Sherman Act.

3. Whether this Court should re-appraise the continuing significance and implications of its closely-divided decisions in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), and determine whether public utilities are compelled under threat of treble damages imposed by the antitrust laws to provide service to competing utility systems, despite the "zone of freedom" regarding such service created by the federal and state regulatory framework within which pervasively regulated utilities exist.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the application of the Seventh Amendment to the Constitution of the United States, Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Section 202(b) of the Federal Power Act, 16 U.S.C. § 824a(b). They are printed in Appendix D.

STATEMENT OF THE CASE

This petition arises from a private antitrust suit brought by the City of Gainesville, Florida, and the city's Utilities Department (collectively hereinafter "Gainesville") against Florida Power & Light Company ("FPL") and Florida Power Corporation ("Florida Power"). Gainesville owns and operates a municipal electrical utility system which serves customers within the city and in adjacent areas of north central Florida. FPL and Florida Power are investor-owned electrical utility companies, each of which serves customers in various portions of Florida. FPL's closest facilities are eighteen miles from the city of Gainesville, and are separated from the city by an area served

by a rural cooperative system. In contrast, Florida Power has transmission lines and other facilities located within Gainesville itself. (App. A 2a-3a.)

Gainesville brought this action under Sections 1 and 2 of the Sherman Act in 1968 claiming that FPL and Florida Power had conspired to divide the wholesale electrical power market in Florida, and that each had attempted to monopolize various geographical portions of that market. Gainesville asserted that, as a result of the alleged conspiracy, it has not obtained an interconnection [1] between its municipal utility system and FPL, and that the creation of an interconnection with Florida Power was delayed.[2]

Proceedings in the Trial Court

Settlement was reached between Gainesville and Florida Power in 1973, leaving FPL as the only defendant. Following elaborate discovery conducted over a seven-year period, the case went to trial before a jury in 1975. After a two-month trial, the trial court gave the case to the jury with instructions which were, as the Court of Appeals subsequently declared, "a model of perfection." (App. A 2a n.3.) After three days of deliberations, the jury found for FPL on all

[1] An interconnection is a transmission line connecting two utilities, which usually is designed to relieve one or the other of the need to maintain some portion of the reserve generating capacity which would otherwise be necessary. Gainesville Utilities Dept. v. Florida Power Corp., 402 U.S. 515, 518-520 (1971).

[2] Gainesville's municipal utility system has, as the result of an order issued by the Federal Power Commission, been interconnected with the facilities of Florida Power since July 1973. App. A 8a. The Commission's order was sustained by this Court in Gainesville Utilities Dept. v. Florida Power Corp., *supra*.

14 of the special verdicts it was asked to return.[3] Following argument and briefing, Judge Tjoflat, now a member of the Court of Appeals for the Fifth Circuit, denied a motion for the entry of judgment n.o.v.

Lengthy and detailed evidence was presented to the jury regarding all aspects of the controversy. There was no evidence of any express agreement or understanding between FPL and Florida Power to divide or monopolize any market. Instead, Gainesville relied at trial upon letters and other documents from and among Gainesville, FPL and Florida Power relating principally to requests made by Gainesville for interconnection of its municipal utilities system with Florida Power or FPL. In addition, certain of the documents on which Gainesville relied concerned requests made to Florida Power or FPL by other small municipalities for interconnection or other services. Gainesville's principal reliance was upon the fact that, after determining whether to offer services in response to such requests, FPL and Florida Power had on occasions advised the other company of that decision.

There was extensive testimony at trial regarding these documents. All of the principal executives of FPL who wrote or received the documents testified at length, and were subjected to cross-examination. They testified unequivocally that FPL's conduct both with respect to Gainesville and other Florida communities was not the result of any agreement or understanding

[3] The only verdict overturned by the Court of Appeals was the jury's negative response to the following question:

> "Do you find by a preponderance of the evidence that there was an agreement, understanding or concert of action between Power & Light and Florida Power whereby Power & Light would not deal with Gainesville through an interconnection because Gainesville was in Florida Power's service territory?"

with Florida Power, but instead reflected FPL's independent judgments as to its best business interests.[4] They showed that FPL's decisions whether to offer services were based upon considerations of cost, the number of customers who could be served, the proximity to FPL's existing facilities, and other matters of FPL's own business interests.[5] They testified that in those instances in which copies of correspondence were provided to Florida Power, or in which FPL's decisions were otherwise communicated to Florida Power, the communication took place only after FPL had already reached its own decision, and was merely a matter of courtesy or to enable Florida Power to consider providing service which it was not within the independent self-interest of FPL to provide.[6]

The trial judge repeatedly emphasized that important issues of credibility and weight were raised by the evidence presented to the jury. For example, he observed in sidebar conferences with counsel that Gainesville's two principal witnesses could not "remember anything", and stated that "there is a credibility issue" with respect to both of them.[7] He described one of those witnesses, who had served as Director of Utilities for Gainesville throughout the relevant period, as "one of the most evasive witnesses I have ever

[4] *See, e.g.*, T. 14 at 183; T. 19 at 74; T. 18 at 196-99. "T." references are to the volumes of the trial transcript. "DX" refers to defendant's exhibits; "PX" refers to plaintiff's exhibits.

[5] *See, e.g.*, T. 14 at 180-82; T. 15 at 178-79; T. 19 at 25-26, 121-22, 123-24.

[6] *See* PX 50; T. 14 at 180; T. 15 at 178; T. 19 at 123-24.

[7] T. 3 at 193; T. 4 at 154.

seen.'"[8] The trial judge also observed in sidebar conferences that Gainesville may well have never been genuinely interested in interconnection, but instead sought only to entrap FPL in antitrust litigation, a possibility which the trial judge described as "tantamount to fraud on the Court."[9]

Proceedings in the Court of Appeals

The Court of Appeals rejected the jury's special verdict that there was no agreement or understanding between FPL and Florida Power that FPL would not deal with Gainesville. The court acknowledged that FPL's conduct "may have been influenced" by "valid economic considerations" (App. A 17a) and evidently recognized that parallel conduct, even if consciously engaged in, could not alone justify overturning the jury's verdict. (App. A 16a-17a.) Nonetheless, it concluded, on the basis of its own assessment of the documents relied upon by Gainesville, and without regard to the jury's appraisal of those documents and the balance of the record, that FPL and Florida Power had conspired to divide the wholesale electrical power market in Florida. Despite the jury's special verdict and the subsequent refusal of an experienced trial judge to render a judgment n.o.v., the Court of Appeals held that "the evidence compels a finding that P&L was part of a conspiracy with Florida Power Corpora-

[8] T. 4 at 116. This witness, John R. Kelly, has been described by Gainesville, as "plaintiff's principal witness . . . [who] in a very real sense personified plaintiff." Brief for Appellants before the Court of Appeals, at 49.

[9] T. 4 at 131. The City Commissioners of Gainesville had testified that interconnection with FPL was not seriously considered by the City. T. 18 at 99-100, 129-30, 132-33, 136-38, 154, 163-66.

tion (Florida Power) to divide the wholesale power market in Florida." (App. A 2a.)

The court acknowledged that there was evidence that the costs to FPL of an interconnection with Gainesville's municipal system "would be prohibitive" (App. A 19a.), that FPL had never refused to interconnect with Gainesville's system, and that it had never specifically required that Gainesville enter into any service area agreement. (*Id.*) The Court described FPL's response to a request for interconnection as "ambiguous", but asserted that the ambiguity was "mere subterfuge", relying for this purpose upon its interpretation of an extract, taken out of context, from an internal FPL memorandum. (App. A 20a.)[10] The court did not refer to lengthy testimony presented at trial by FPL regarding the relevant documents which was flatly inconsistent with the Court of Appeals' factual finding.[11]

The Court of Appeals acknowledged that the electrical power industry is "heavily regulated", and recognized that "government sanctioned territorial agreements" are common. (App. A 14a.) Nonetheless, it held that it "need not consider" whether antitrust immunity exists here because of state action. (App. A 15a.) Moreover, relying upon the closely-divided decision of this Court in *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973), it concluded that the pervasive federal and state regulatory framework within which FPL exists is irrelevant to the application of the antitrust laws to its conduct and decided this case on the same terms and upon the basis of the same standards as if that regulatory framework did not exist. (App. A 15a-16a.)

[10] Significantly, the court altered its original statement regarding the asserted "subterfuge" in its order denying FPL's motion for rehearing, presumably in an effort to provide a more persuasive explanation for its refusal to take account of the ambiguity of the evidence. *Compare* App. A 20a and B 29a.

[11] See, *e.g.*, T. 15 at 122-24, 173-74; T. 19 at 11-16, 238-40.

Nothing in the opinion of the Court of Appeals recognized the existence, or considered the significance, of any issues of credibility or weight regarding the evidence offered at trial. The court decided the case upon the basis of its interpretation of the documents relied upon by Gainesville, with only slight and passing attention to the lengthy testimonial evidence offered by the parties. Upon the basis of that narrow and partial analysis of the detailed trial record, the Court of Appeals, in an opinion rendered some seventeen months after argument, declared that the jury was "compel[led]" to find the existence of a conspiracy to divide the market (App. A 2a.), and remanded the case for further proceedings limited merely to issues of causation and damages. (App. A 23a-24a.) There was no consideration in the court's opinion of the appropriateness of a new trial on the issue of conspiracy, or even whether the trial court should be afforded an opportunity to consider whether a new trial would be appropriate.

REASONS FOR GRANTING THE WRIT

The case presents three issues of wide public significance as to which the guidance of this Court is urgently needed. Each of the issues independently warrants the attention of this Court to review the novel standards applied here by the Court of Appeals and to

clarify questions which are important to the disposition of numerous other cases.

First, the Court of Appeals acted contrary to established principles governing appellate review of jury verdicts, particularly where motive and intent are of critical importance. Without pausing to recognize the existence of questions of credibility and weight, or even to consider whether the jury's determination was reasonably supported by the extensive testimony offered by FPL at trial, the Court of Appeals overrode both the jury's special verdict and the refusal of an experienced trial judge to disturb that verdict. It resolved factual disputes to its own satisfaction, substituted its factual findings for those made by the jury, and remanded the case for the consideration only of causation and damages. In so doing, it invaded the historic functions of juries, deprived FPL of its constitutional right to a trial by jury, and demonstrated clearly the need for further guidance from this Court as to the proper limits of appellate review.

Second, in holding that parallel conduct on the part of two public utilities operating in the same state, accompanied only by circumstantial evidence of coordination which even the Court of Appeals described as ambiguous in part, compelled a finding of illegal conspiracy, the Court of Appeals disregarded the evidentiary principles heretofore applied by this and other courts in antitrust litigation. In so doing, it relied entirely upon cases in which such evidence has been held to permit—but never previously to require—such a finding, and introduced serious confusion and uncertainty into an important area of antitrust law.

Third, the Court of Appeals attached no significance to the complex federal and state regulatory framework within which FPL and other electrical utilities must conduct their business activities. It disregarded the provisions of the Federal Power Act governing interconnection, and resolved the issues in this case as if there were no relevant federal or state regulatory provisions. The decision of the Court of Appeals shows clearly the need for this Court to re-examine the meaning and significance of its closely-divided decisions in *Otter Tail Power Co.* v. *United States, supra,* and *Cantor* v. *Detroit Edison Co., supra,* and to provide guidance regarding the extent to which pervasively regulated utilities should be faced with treble damage exposure under the antitrust laws for actions within the purview of the Federal Power Act.

I.

The Court of Appeals Usurped the Functions of the Jury.

This Court has repeatedly acted to protect the constitutional right to trial by jury from denial or erosion. It has declared that trial by jury is a "basic and fundamental feature of our system of federal jurisprudence", *Jacob* v. *New York,* 315 U.S. 752, 752-53 (1942), and that any "curtailment" of that right must be "scrutinized with the utmost care." *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500, 501 (1959). It has defined narrowly the proper limits of appellate review of jury verdicts, and made clear that it is the function of the jury, and not an appellate court, to weigh credibility and to determine facts. *Gallick* v. *Baltimore & Ohio R.R. Co.,* 372 U.S. 108, 113-117 (1963). It has warned that a jury's verdict must be sustained whenever it may be supported by any reasonable assessment of the

evidence, viewing that evidence in the most favorable possible light to the verdict, and drawing all reasonable inferences in the verdict's support. *Id.; Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355 (1962). Any less deference to a verdict would, as this Court has emphasized, constitute "an undue invasion of the jury's historic function." *Lavender* v. *Kurn*, 327 U.S. 645, 652 (1946).[12]

The Court of Appeals disregarded these important principles, and did not accord the jury verdict the respect due it under *Lavender* v. *Kurn*, *supra*. There is no indication in the Court of Appeals' opinion that it considered the extensive testimonial and other evidence presented by FPL in order to determine whether there was "an evidentiary basis for the jury's verdict," the test under *Lavender* v. *Kurn*. On the contrary, the Court of Appeals itself assessed only a portion of the evidence presented in a lengthy and complex trial and substituted its appraisal of a written record for the jury's evaluation of live testimony. On this basis, the court overturned the jury's special verdict and the refusal of an experienced trial judge to disturb that verdict, despite the serious questions of credibility and weight which the trial judge found to be presented by Gainesville's evidence. Moreover, the Court of Appeals

[12] In the same case, the Court carefully defined the narrow limits of appellate review of jury verdicts:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." *Id.* at 563.

did not even permit the trial court to consider whether a new trial should be conducted,[13] but instead compelled the entry of a new factual determination, contrary to that made by the jury and left undisturbed by the trial court. It did not merely overturn the jury's special verdict on the issue of conspiracy—instead, it substituted a new verdict of its own devising.

This Court has emphasized that an assessment of live testimony is particularly important in antitrust litigation, where "motive and intent play leading roles." *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 (1962). It has discouraged summary judgment and trial by affidavits of antitrust issues, recognizing that live testimony is needed to evaluate credibility and to determine the weight of evidence. *Id.* It is plainly inconsistent with those important principles now to permit the Court of Appeals, which did not have the advantage of first-hand exposure to the testimony at trial, to compel the substitution of its factual conclusions for those of the jury and trial court. Whatever might be permissible in other situations, it is inappropriate in antitrust litigation for an appellate court to reject a jury's assessment of motive and intent, based upon substantial testimonial and other evidence, and to require instead the adoption of its own interpretation of portions of that evidence.

FPL presented extensive evidence at trial to establish its motive and intent with respect to interconnection. The jury obviously accepted that evidence, and

[13] In so doing, the Court of Appeals disregarded the appropriate limits of its discretion under Rule 50(d) of the Federal Rules of Civil Procedure with respect to the entry of judgment n.o.v. after a motion for such judgment has been denied by the trial court. *E.g.*, Iacurci v. Lummus Co., 387 U.S. 86 (1967).

[redacted]rial judge declined to disturb the jury's verdict. This Court has frequently declared that in such situations an appellate court may not reject a verdict merely because it differs with the jury as to the weight and meaning of the evidence. *Haupt* v. *United States,* 330 U.S. 631, 639-40 (1946). To the contrary, as this Court has unequivocally stated,

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant* v. *Peoria & P.U.R. Co.,* 321 U.S. 29, 35 (1944).

Review by this Court is needed to reestablish the proper limits of appellate review of jury verdicts, particularly in antitrust cases, and to vindicate FPL's right under the Seventh Amendment to trial by jury.

Few sharply litigated factual issues admit of but one reasonable resolution. Even fewer allegations of conspiracy can be so resolved. Gifted as appellate judges may be, they are not endowed with any special competence to find that a jury and an experienced trial judge were utterly unreasonable in assessing evidence —both testimonial and documentary—which they heard and considered under trial conditions. A printed record and limited oral argument are not the keys to omnipotence in such intensely factual matters.

II.

The Court of Appeals' Departure From the Principles Governing the Assessment of Parallel Conduct in Antitrust Litigation Warrants Review by This Court.

The Court of Appeals disregarded principles which have long been applied by this and other courts in the

evaluation of parallel conduct in antitrust litigation. The court held that parallelism, accompanied only by circumstantial evidence which even it regarded as ambiguous in part, required the jury's special verdict to be set aside, and compelled a finding of conspiracy and concerted action. This action went far beyond any of the cases upon which the court relied. The opinion of the Court of Appeals will, unless corrected by this Court, introduce confusion and uncertainty into an important area of antitrust law.

Elaborate evidence was presented by FPL at trial to show that its conduct was the result, not of any agreement or conspiracy with Florida Power, but of its independent assessment of its own business interests. FPL offered extensive testimony to show that whenever it elected not to offer interconnection or other services, it did so on the basis of cost, the size of the potential market, and other pertinent business considerations.[14] The testimony showed clearly that FPL consistently sought, not to create a territorial allocation of the wholesale electrical power market, but instead to evaluate each proposed service on the basis of its own independent business interests.[15] The jury obviously accepted this evidence of FPL's motivations, and the trial judge declined to disturb the jury's special verdict.

The Court of Appeals' invasion of the jury's province is further seen in its extensive analysis, with the aid of its own italics, of evidence disclosing the responses by FPL and Florida Power to requests for service from cities other than Gainesville going back some ten

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[14] *See, e.g.,* T. 14 at 180-82; T. 15 at 178-79; T. 19 at 25-26, 121-22.

[15] *See, e.g.,* T. 19 at 69.

years before the latter's request for interconnection. (App. A 7a-13a.) The testimony at trial showed that FPL declined in 1958 to offer service to the small village of Chiefland because 60 to 70 miles of expensive transmission lines would have been required in order to serve no more than 250 to 300 customers.[16] In 1956, FPL did not offer service to Lake Helen because 6 miles of transmission lines would have been required to reach that small village, which already was located under Florida Power's transmission lines and adjacent to one of its generating plants.[17] Similarly, in response to an unofficial inquiry from an informal group of private citizens a few years later, FPL expressed no interest in providing service to Winter Garden because it would have been necessary to construct 30 miles of costly transmission lines through crowded urban areas.[18] The testimony with respect to these and the other instances cited by the Court of Appeals was that FPL's decisions were based upon an independent appraisal of the course of conduct that would best serve its own business interests.[19] Clearly the properly instructed jury believed this testimony, which was simply ignored by the Court of Appeals.

In short, the Court of Appeals rejected the conclusions of both the jury and the trial court, resolved ambiguities in the evidence adversely to FPL, and ordered the entry of a factual finding in accordance with its own determinations. Although appellate courts have

[16] T. 14 at 180-82; DX 533.

[17] T. 15 at 178-79.

[18] T. 19 at 25-26, 121-22; DX 538.

[19] T. 14 at 180; T. 19 at 118, 124.

previously held that conscious parallelism, together with additional evidence from which an agreement or understanding might be inferred, may be sufficient to sustain a jury verdict of conspiracy,[20] no court has gone so far as to hold that such evidence compels such a finding despite a jury verdict to the contrary. Here, the court used parallelism and a so-called "plus-factor"[21] not to sustain a jury verdict, but instead to override it and compel the substitution of an opposite result.

It has heretofore been clear that evidence of conscious parallelism standing alone is not sufficient even to permit antitrust claims to go to a jury, since such conduct may reflect nothing more than similar solutions to similar business problems. *E.g., Modern Home Institute, Inc.* v. *Hartford Acc. & Indem. Co.*, 513 F.2d 102 (2d Cir. 1975); *Dahl, Inc.* v. *Roy Cooper Co., Inc.*, 448 F.2d 17 (9th Cir. 1971). *See also Theatre Enterprises, Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537 (1953). Courts have been particularly careful to avoid inferences of conspiracy in markets in which the firms hold natural monopolies by reason of regulatory requirements, where the problems confronted by the

[20] *E.g.*, Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); Pittsburgh Plate Glass Co. v. United States, 260 F.2d 397 (4th Cir. 1958), *aff'd*, 360 U.S. 395 (1959). These and the other cases relied upon by the Court of Appeals all involved decisions sustaining jury or trial court determinations. In none of those cases did the appellate court use such evidence to reject a jury's verdict and to require an opposite result. (App. A 16a-17a.)

[21] Among the various confusing aspects of the Court of Appeals' opinion, not least is the description of the documents relied upon by Gainesville as a "plus." (App. A 17a.) Those documents represented, not an additional or "plus" factor in Gainesville's evidence, but virtually its entire case.

firms are likely to be similar, and the range of possible responses narrow. *Compare, e.g., Delaware Valley Marine Supply Co.* v. *American Tobacco Co.*, 297 F.2d 199 (3rd Cir.), *cert. denied*, 369 U.S. 839 (1961). It is only where parallel conduct is shown to have been contrary to a firm's independent self-interest that an inference of conspiracy may be drawn. *First National Bank* v. *Cities Service Co.*, 391 U.S. 253 (1968); *Naumkeag Theatres Co., Inc.* v. *New England Theatres, Inc.*, 345 F.2d 910 (1st Cir.), *cert. denied*, 382 U.S. 906 (1965); *Delaware Valley Marine Supply Co.* v. *American Tobacco Co., supra.*[22]

Unless this Court grants review, the decision of the Court of Appeals will drastically alter the principles described above, and compel—rather than simply permit—a verdict of conspiracy and concerted action whenever parallel conduct is accompanied by any "plus factor." If the Court of Appeals is correct in its holding, the experienced trial court erred in even submitting the conspiracy issue to the jury. In the future, a handful of letters will provide the basis for summary judgment in favor of any claimant that alleges conspiracy. Judges rather than juries will increasingly decide complex factual issues in antitrust treble damage litigation. Review by this Court is needed to correct

[22] Nothing in the decision of this Court in Interstate Circuit v. United States, 306 U.S. 208 (1939), which was heavily relied upon by the Court of Appeals, is to the contrary. The Court held there, in a non-jury case, that the District Court's findings of conspiracy and concerted action could be sustained. In that case, unlike this, defendants made no significant effort to produce testimony denying a conspiracy, and an important part of this Court's decision was that defendants' silence represented evidence against them "of the most convincing character." *Id.* at 226. In contrast, there was in this case, as the jury found and as the trial judge recognized, "convincing" evidence that no conspiracy existed.

the errors of the Court of Appeals and to provide further guidance as to the proper standards for the evaluation of parallel conduct.

III.

Guidance From This Court Is Needed as to the Appropriate Relationship Between the Antitrust Laws and the Federal and State Regulatory Framework Within Which Electrical Utilities Exist.

The Court of Appeals gave but cursory consideration to the impact upon this case of the pervasive federal and state regulatory framework within which the electrical power industry exists. After observing that this Court held in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), that regulation under the Federal Power Act did not prevent governmental action under the antitrust laws, the Court of Appeals declined to give further consideration to the possible relevance of that regulatory framework to the issues of this case. In particular, it did not consider whether federal or state regulatory requirements limit or exclude any obligation which FPL might otherwise have under the antitrust laws to permit interconnection with Gainesville's municipal utilities system. Instead, the Court of Appeals decided this case precisely as if those regulatory requirements did not exist.

The decision of the Court of Appeals illustrates vividly the need for further guidance from this Court regarding the impact upon the antitrust laws of federal and state regulatory requirements applicable to electrical utilities. Five years ago, a closely-divided Court, with two Justices not participating, decided *Otter Tail Power Co.* v. *United States, supra.* Four members of the Court joined in an opinion for the Court which acknowledged that the Federal Power Act gave the

Federal Power Commission broad authority regarding interconnection,[23] but denied that the Act's legislative history indicated any decision by Congress to exclude issues of interconnection from review under the antitrust laws. 410 U.S. at 372-75. Three members of the Court found, however, a "clear congressional purpose" to permit electric utilities "to decide for themselves" whether to sell power at wholesale "as they see fit." *Id.* at 386 (opinion of Stewart, J.). They concluded that, absent a contrary order by the Federal Power Commission,[24] a refusal to permit interconnection falls within the "zone of freedom" which was "specifically created" by the Federal Power Act. *Id.* at 387.

None of the issues presented here was resolved by the Court's subsequent opinion in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976). The Court there approved the application of the antitrust laws to the distribution of light bulbs by electrical utilities. There was no issue of interconnection or of the extent of any "zone of freedom" created by Section 202(b) of the Federal Power Act with respect to interconnection. Nonetheless, three members of the Court recognized that the operations of utilities will be seriously disrupted by broad applications of the antitrust laws, and that any treble damage liabilities will ultimately be

[23] Section 202(b) of the Federal Power Act, 16 U.S.C. § 824a(b), authorizes the Federal Power Commission to order interconnection whenever it is "necessary or appropriate in the public interest" and to prescribe terms and conditions for the interconnection. Such an order is not, however, permissible if an "undue burden" would be placed upon the utility.

[24] As described above, such an order was in fact issued by the Commission to compel Florida Power to interconnect its facilities with Gainesville.

borne by the utilities' customers. *Id.* at 615 (opinion of Stewart, J., dissenting).

This case affords the Court an important opportunity to examine the continuing significance and implications of *Otter Tail* and *Cantor* and to redefine the proper relationship between the requirements of the Federal Power Act and the antitrust laws. Here, as in *Otter Tail,* the issues arise from the requests of a municipal utility for interconnection, and here, as there, it is important to determine the terms and extent of any "zone of freedom" created by the Act. Review of this case by the Court will permit plenary consideration of the proper interrelationships between two important federal statutes.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

May 22, 1978

No. 76-1542

GAINESVILLE UTILITIES DEPARTMENT and City of Gainesville, Florida, *Plaintiffs-Appellants,*

v.

FLORIDA POWER AND LIGHT COMPANY, *Defendant-Appellee.*

Appeal from the United States District Court for the Middle District of Florida.

Before BROWN, Chief Judge, GODBOLD, Circuit Judge, and MEHRTENS*, District Judge.

JOHN R. BROWN, Chief Judge:

After ten years of litigation and one trip to the Supreme Court in a related case,[1] we finally reach the merits in this private antitrust suit. The City of Gainesville[2] contends that by resisting an interconnection with its municipal power system Florida Power & Light (P&L) violated both Sherman Act § 1 and § 2. 15 U.S.C.A. §§ 1-2. A jury found for the defendant on special verdicts, and the District Court denied a judgment n. o. v. After an extensive review of the record, we reverse on one question

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* Senior District Judge of the Southern District of Florida, sitting by designation.

[1] *Gainesville Utilities Dept. v. Florida Power Corp.*, 1971, 402 U.S. 515, 91 S.Ct. 1592, 29 L.Ed.2d 74.

[2] For convenience, we refer to both plaintiffs-appellants in this case as "the City" or "Gainesville."

only[3]. We hold that the evidence compels a finding that P&L was part of a conspiracy[4] with Florida Power Corporation (Flor da Power) to divide the wholesale power market in Florida.

Connecting On An Interconnection

The municipal utility system of Gainesville serves customers within the City and in the surrounding area in Alachua County, located in the north central part of Florida. Privately owned P&L, the largest electric utility in the state, operates generally in the eastern and southern parts of Florida from Jacksonville in the north to the Miami area in the south. P&L serves two cities on the eastern edge of Alachau County. The closest P&L line to the Gainesville system is within approximately 18 miles. Florida Power, also privately owned, serves the area on

[3] We commend the District Court for using special verdicts in this complex antitrust case. F.R.Civ.P. 49(a). They allow us to zero in on exactly where we think the trial court erred without disturbing acceptable factual findings. Brown, Federal Special Verdicts: The Doubt Eliminator, 44 F.R.D. 338 (D.C., 1967). *See Wolfe v. Virusky*, 5 Cir., 1972, 470 F.2d 831, 837 (Brown, C. J., concurring); *In re Double D Dredging Co.*, 5 Cir., 1972, 467 F.2d 468, 469 n. 3; *Thrash v. O'Donnell*, 5 Cir., 1971, 448 F.2d 886, 889-92. Indeed, they enable us to put an end to the § 1 allegation that P&L refused to interconnect unless there was a retail territorial agreement, as well as to the § 2 attempt to monopolize claim, although the § 1 issue on dividing the wholesale market goes back for retrial. The charge was a model of perfection in its careful instructions on guiding legal principles and in meticulously tying them to the specific numbered questions. All fourteen special verdict questions are attached as an appendix.

[4] Section 1 of the Sherman Act makes every "conspiracy, in restraint of trade or commerce" illegal. 15 U.S.C.A. § 1. As defined by the trial court in its jury charge and as used in this opinion, the word "conspiracy" for § 1 purposes means any agreement, understanding, reciprocal practice, or concert of action between the parties.

the western side of Gainesville. As the second largest electric utility in the state, its predominant service area is the western and central portions of Florida from the Panhandle in the north to the St. Petersburg area in the south. Florida Power's lines are within the City of Gainesville. The company serves, for example, the University of Florida, located inside the city limits.

This case grew out of Gainesville's long struggle to obtain an interconnection for its electric system with either of these two power companies. The Supreme Court has described the merits of an interconnection, as follows:

> The major importance of an interconnection is that it reduces the need for the "isolated" utility to build aind maintain "reserve" generating capacity. An interconnection is simply a transmission line connecting two utilities. Electric power may move freely through the line up to the line's capacity. Ordinarily, however, the energy generated by each system is sufficient to supply the requirements of the system's customers and no susbtantial amount of power flows through the interconnection. It is only at the times when one of the connected utilities is unable for some reason to produce sufficient power to meet its customers' needs that the deficiency may be supplied by power that automatically flows through the interconnection from the other utility. To the extent that the utility may rely upon the interconnection to supply this deficiency, the utility is freed of the necessity of constructing and maintaining its own equipment for the purpose.

Gainesville Utilities Dept. v. Florida Power Corp., 1971, 402 U.S. 515, 518-20, 91 S.Ct. 1592, 1595, 29 L.Ed.2d 74, 78-79 (footnote omitted). Thus, to avoid making a large investment in generating equipment, Gainesville needed an interconnection.

During World War II, the Federal Power Commission (FPC) issued an emergency order requiring a low capacity interconnection between Florida Power and the City. When the emergency ended and the order was terminated, Florida Power tried to persuade the City to purchase power at wholesale from the company instead of installing additional generating capacity. The City refused, and Florida Power dismantled the interconnection when new generation for the City's system was installed in 1955.

As Gainesville's utility system grew, however, so did interest in an interconnection. In 1964 James Richardson, an outspoken advocate of interconnection, was elected to the City Commission. He and other members of the Commission explored the possibility of interconnection, primarily with Florida Power. The City and Florida Power were at that time competing for customers southwest of Gainesville, and Florida Power insisted, as a prerequisite to interconnection, upon a territorial division for retail customers that would restrict the municipal system to the city limits.[5]

Finally, in January 1965, John Kelly, the director of Gainesville's utility system, wrote the chairman of the FPC requesting assistance in obtaining an interconnection from either Florida Power or P&L. The FPC sent copies of the letter to both companies and asked for comments.

The day after P&L received the Commission's letter, Robert Fite, president of the company, also received a letter from Ed Dunn, vice-president and general counsel of Florida Power, attaching copies of Kelly's letter and that of the FPC. Dunn asked Fite to "furnish me on or before Friday, February 12, 1965, your comments in this matter so that we might prepare our response to the Federal Power Commission." Px. 5. Fite routed Dunn's letter to Ben Fuqua, vice-president of P&L, with an "F.Y.I." notation, and a copy also was sent to McGregor Smith, P&L's chief executive officer.

[5] The legality of territorial agreements at the retail level is not before this Court. However, retail territorial agreements, approved by the Florida Public Service Commission, have been upheld under Florida's antimonopoly statute. *City Gas Co. v. Peoples Gas System, Inc.*, Fla., 1965, 182 So.2d 429.

A week later, Florida Power's president, William Clapp, wrote the FPC indicating a willingness to discuss interconnection with the City on the same terms previously demanded by the company. He further stated with specific reference to Kelly's request about obtaining an interconnection with P&L:

> Florida Power Corporation and Florida Power & Light Company several years ago entered into territorial agreements to preserve territorial integrity, thus avoiding duplication and economic waste. These agreements are on file with the Florida Public Utilities Commission, pursuant to that Commission's jurisdiction of these two companies. *Accordingly, we would have to resist any effort to violate the letter or spirit of these territorial agreements.*

Px 294 (emphasis added). Clapp then sent Fite a copy of the letter "to keep you informed on this matter, in case you have any questions put to you." Px 6.

On February 17, 1965, the final day for submitting comments, Fuqua wrote on behalf of P&L:

> The facilities of the Florida Power Corporation are, of course, much closer to those of the City of Gainesville than are any facilities of our Company. Obviously, we feel it would be an economic waste for us to undertake to build lines when Florida Power Corporation is already in immediate proximity.
>
> We have received a copy of the letter addressed to the Commission by Mr. W. J. Clapp, President of the Florida Power Corporation, and we have observed that Mr. Clapp expresses a willingness to sit down

> and try to work out this situation with the City of Gainesville officials. We are quite hopeful that this can be done.

Px 7.

Representatives of the City and Florida Power subsequently met several times to discuss the interconnection, but the discussions ended in failure. In November 1965, the City filed a formal application with the FPC for an order directing Florida Power to interconnect. No application was filed against P&L because at the time it was not subject to Commission jurisdiction.[6]

During the FPC proceeding which eventually culminated in an interconnection order, Clapp contradicted statements in his letter to the FPC and asserted that Florida Power had no "agreement" with P&L prohibiting the latter from interconnecting with Gainesville. Kelly, after consulting with Commissioner Richardson who was then Mayor, wrote P&L on July 7, 1966, and inquired whether, in view of Clapp's testimony, P&L would open negotiations on an interconnection with Gainesville. Fite responded that the City should deal with Florida Power because such a tie, in his opinion, would be cheaper and more economical. "It is for this reason that we believe any tie with Gainesville would necessarily be one with Florida Power." Px 12.

Kelly wrote again on August 2. He questioned Fite's estimate of the cost of an intertie with P&L and asked "for a meeting between the engineers of Florida Power & Light and Gainesville to determine the engineering necessary for the interconnection and its cost." Px 13.

Fite responded by making it clear to Kelly that the City should resign itself to dealing with Florida Power

[6] FPC jurisdiction over P&L was not established until the Supreme Court's decision in *FPC v. Florida Power & Light*, 1972, 404 U.S. 453, 92 S.Ct. 637, 30 L.Ed.2d 600.

since even P&L wanted the City to agree with Florida Power on a retail territorial arrangement:

> In discussing a possible interconnection with Gainesville among ourselves, the question of responsibility for service areas always arises. *In this case, three parties are involved—the City of Gainesville, Florida Power Corporation, and Florida Power & Light Company.* It would seem that in order to avoid duplication of distribution facilities, *any plan should include an agreement that would define the service areas of all three suppliers and would clearly indicate the responsibility of each one.* Have you given any thought to this subject—and what are your comments as to how this matter could be resolved?

Px 14 (emphasis added). Kelly answered on August 30 that the City was prepared to discuss the possibility of a territorial agreement between the City and P&L even though "there is no necessary connection between interchange and territorial arrangements." He explained, however, that "[t]he question of a service area agreement between Gainesville and Florida Power is really an extraneous matter. . . ." Px 304. When Fite did not respond, Kelly wrote again on October 10, noting that regardless of the outcome of the pending FPC proceeding against Florida Power, "we feel that we should keep the 'door' open for an intertie with your system as possibly being the more advantageous of the two courses open to us." Px 16.

On October 24, Fite responded. Despite Kelly's rejection of a territorial arrangement with Florida Power, Fite again asked Kelly to "consider and comment on 'service area responsibilities' of the several utility companies in the area," specifying it as "a preliminary to any person-to-person discussion." Px 18. This ended the correspondence.

Eventually, in August 1968, the City filed a complaint charging the two companies with violating § 1 and § 2 of the Sherman Act. While the case was pending, the FPC ordered Florida Power to interconnect with the City which was upheld by the Supreme Court in 1971.[7] The interconnection was completed in July 1973. Meanwhile, the antitrust suit against Florida Power was settled, but P&L remained a defendant. Gainesville sought damages of approximately 8 to 11 million dollars before trebling based on what the City believed it lost due to the delay in interconnection.

Same Old Story

At trial, Gainesville primarily argued that P&L refused to interconnect because it was part of a conspiracy with Florida Power to divide the wholesale electric power market in Florida. In other words, P&L simply did not want to invade the territory of its competitor. To buttress this argument, Gainesville relied on internal memoranda and correspondence between the top echelons of P&L and Florida Power on how these two companies handled the requests for service from other cities.

For example, Florida Power served the town of Chiefland under a retail franchise. When the franchise expired in 1958, the City Council wrote P&L inquiring whether it would be interested in obtaining the franchise. In an internal memorandum, Ben Fuqua, vice-president of P&L at the time, stated why the company would not serve Chiefland:

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[7] *Gainesville Utilities Dept. v. Florida Power Corp.*, 1971, 402 U.S. 515, 91 S.Ct. 1592, 29 L.Ed.2d 74.

The FPC hearing examiner had recommended an interconnection conditioned on reaching a retail territorial agreement with Florida Power. This requirement, however, was eliminated by the Commission. *Id.*, 1968, 40 F.P.C. 1226, 1240-42.

> *In the first place, this is in the Florida Power Corporation territory* and they have been servicing Chiefland under a franchise which has expired. In the second place, it would probably require extensions of 60 or 70 miles for us to get to this locality.

Px 48 (emphasis added). Fuqua explained what else should be said in the letter:

> At the same time I would like to give a plug for the Florida Power Corporation people along the lines of their being a sister utility, a private enterprise corporation, etc., etc.
>
> You may recall that Bill Clapp [president of Florida Power], either by letter or by sending representatives, declined to consider wholesale supply of electricity to Lake City, Arcadia and Starke. In each of these instances he endorsed our company.

Id. Subsequently, Fuqua wrote Chiefland disclaiming interest in the franchise and sent a blind carbon to Clapp, Florida Power's president. Clapp, in turn, sent Fuqua his thanks and promised:

> Please be assured that if a similar situation should occur concerning your Company, we would be glad to reciprocate.

Px 51.

Arcadia, which was mentioned in Fuqua's memorandum, was served by a P&L franchise. In 1956, the City was considering buying the distribution system and asked Florida Power whether it would sell electricity to the city at wholesale. Florida Power's president Clapp wrote P&L's Fite about the request:

> I am asking Mr. A. V. Benson, our Division Manager in Lake Wales, to go by and talk to the author of the

> attached letter. By answering this letter verbally, I figure we might be of some assistance in pointing out to the City Attorney the error of their ways. You may be assured our answer is that we have no power facilities within this area.

Px 40 at 2. Fite thanked Clapp and expressed hope of helping him in return:

> We sure do appreciate what you are doing for us on the matter covered in your February 7 letter. I hope this and the same kind of matter in the northern end of the state will not continue to take your time.
>
> Again, thanks a million for your help. *I sure hope we have an opportunity to repay you.*

Px 42 (emphasis added).

Lake City, the second city mentioned in Fuqua's memorandum about Chiefland, had a similar problem as Arcadia. In 1955 P&L's retail franchise was expiring and the City asked Florida Power for service at either retail or wholesale. Clapp wrote back and declined while sending a blind carbon copy to Fite. Attached to the carbon copy was a handwritten note from Clapp to Fite explaining that "[t]his is about like I read to you over the phone." Px 37.

Finally, the third city named in Fuqua's memo, Starke, is a self-generating system located about 20 miles northeast of Gainesville in an area served generally by P&L. In December 1954, Florida Power was approached about obtaining electric service. An internal office memorandum from E. E. Dearmin to Clapp explained what happened:

> As you suggested, I informed these gentlemen at the beginning that we were very sorry, but in no position whatsoever to make them a proposition as to supplying them with wholesale power service. I went into considerable detail as to why we could not make them

> a proposition, *stressing particularly the point of service area.*

Px 36 at 2 (emphasis added). Although P&L was not even serving Starke, Clapp, nonetheless, sent Fite a copy of the memo. Fite conceded at trial that the entire episode was "routine." R., vol. 19, at 102-03.[8]

The "routine" was followed when the City Clerk of Lake Helen wrote P&L in November 1956 soliciting an offer to purchase the municipally-owned electric system. Px 46 at 4. Alan Wright of P&L, who received the letter, immediately passed it up to Fuqua. Subsequently, Wright wrote the City declining to make a proposal, explaining that "we are not rendering service in the Lake Helen area and do not have facilities to serve there. . . ." *Id.* at 2. And even though Lake Helen was not being served by Florida Power, Wright sent a blind carbon of the refusal to Clapp. In June 1958, P&L's Fite reminded Clapp of the incident:

> When we discussed the territorial question in Boston the other day, you mentioned that you were interested in buying the electric facilities in Lake Helen. Perhaps you have forgotten but back in 1956 we received an inquiry from Lake Helen and wrote them that they were not in our territory and we had no proposal to make. Alan B. Wright signed the letter and sent you a blind copy. I am enclosing reproductions of these letters for your information.
>
> Here's hoping you get Lake Helen.

Px 46 at 1. At trial, Fite characterized the conduct as

> a routine kind of thing in the industry. It was a common courtesy to send a copy of matters that pertained

[8] At the time of the incident, P&L was interested in leasing the Starke system and had itself declined to sell power to Starke. Px 343. *Cf.* Lake Helen, discussed *infra*, where P&L declined to deal with a municipal system that Florida Power was trying to acquire.

> to the other's company. These—these situations were just routine, that's all.

R., vol. 19, at 118.

In 1962, the City of Orlando's municipal utility system, which was interconnected with Florida Power, built a new generation facility near a P&L plant. P&L later interconnected with the Orlando plant, but Florida Power's assent to the interconnection was shown by a memorandum of August 8, 1962, from H. K. McKean, vice-president of Florida Power, to Clapp reporting on a meeting that day with McGregor Smith, P&L's chief executive officer. The meeting resulted in an agreement on a cross-state transmission line to be built from P&L's Brevard Station to Florida Power's West Lake Wales Station. One of the terms was that

> [t]he Florida Power Corporation will assist in obtaining an interconnection between the Brevard Substation of Florida Power & Light Company and the Indian River Plant of the Orlando Utilities Commission. *Mr. Smith admitted frankly that if it hadn't been for me, this interconnection would have been in some time ago.*

Px 121 at 1 (emphasis added).

In 1963, furthermore, the City of Winter Garden was served at retail by Florida Power, but it was considering switching to a municipally-owned system. P&L's Fite responded to an inquiry from a "citizens" committee with the statement that, while the company had received no request to sell power to Winter Garden, it would not do so in any event because the company did not supply municipal systems with wholesale power and because Winter Garden was beyond its "economic service area." He sent Clapp a blind carbon copy of his refusal.

Finally, in a 1965 P&L internal memorandum, Fuqua reported to Fite on a telephone call from Angel Perez, vice-president of Florida Power. Fuqua was told that the City of Jacksonville, which had a municipal power system, had approached Perez directly about an interconnection. Perez had responded by asking why the City did not go to P&L with whom it already was intertied. When Jacksonville's representative said the City preferred a tie with Florida Power for economic advantages, "Perez inquired if P&L would let Florida Power Corp. go through its territory to serve Jacksonville." Px 58. Fuqua concluded the memo by explaining that "Perez will be over here to go to West Palm Beach with us next Thursday and we agreed we would discuss the matter further then. . . ." *Id.* At trial, Fuqua admitted that Perez had indeed come to P&L, but he could not recall talking to him about the matter. Fuqua did confirm, however, that Jacksonville never intertied with Florida Power. R., vol. 15, at 82.

After a lengthy trial, the case was submitted to the jury on fourteen special verdict questions concerning three theories of liability under Sherman Act § 1 and § 2. See Appendix. The first question pertained to an alleged § 1 violation:

> 1. Do you find by a preponderance of the evidence that there was an agreement, understanding or concert of action between Power & Light and Florida Power whereby Power & Light would not deal with Gainesville through an interconnection because Gainesville was in Florida Power's service territory?

The jury's negative answer precluded consideration of questions on whether the territorial agreement was a substantial factor in Gainesville's not having obtained an interconnection and on what damages, if any, Gainesville incurred. Since we find that "the facts and inferences point so strongly and overwhelming in favor" of Gainesville on the existence of a conspiracy to divide the

market, *Boeing Co.* v. *Shipman,* 5 Cir., 1969, 411 F.2d 365, 374 (en banc), we reverse the trial court's refusal to grant Gainesville's motion for a judgment n. o. v. on this one question and remand for further consideration.[9]

Dividing A Market

A horizontal market division in most industries is clearly a per se violation of the Sherman Act. *United States v. Topco Associates,* 1972, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515; *Hobart Brothers Co. v. Malcolm T. Gilliand, Inc.,* 5 Cir., 1973, 471 F.2d 894, *cert. denied,* 412 U.S. 923, 93 S.Ct. 2736, 37 L.Ed.2d 150. On the other hand, the heavily regulated electric power industry is often characterized by government sanctioned territorial agreements. In this case, however, the Florida Public Service Commission did

[9] The second theory of liability also was based on Sherman Act § 1. The jury gave a negative reply to the question:

> 3. Do you find by a preponderance of the evidence that there was an agreement, understanding or concert of action between Power & Light and Florida Power whereby neither would interconnect with Gainesville unless the City would enter into a territorial agreement?

The jury's negative response again precluded consideration of whether the alleged agreement was a substantial factor in Gainesville's not having obtained an interconnection and of what damages, if any, Gainesville suffered.

The third theory of liability was that P&L attempted to monopolize the electric power market in violation of Sherman Act § 2. Gainesville claimed that the specific act which furthered P&L's attempted monopolization was its refusal to deal with Gainesville or to interconnect without a territorial agreement. To establish whether such a refusal took place, the jury was first asked:

> 8. Do you find by a preponderance of the evidence that Gainesville sought an interconnection from Power & Light?

The jury's negative answer prevented consideration of questions on whether P&L refused to interconnect without a territorial agreement, if P&L was attempting to monopolize a relevant market, and what damages resulted.

not approve any territorial arrangement between P&L and Florida Power relating to the Gainesville area. Thus, we need not consider whether antitrust immunity exists because of state action.[10] Moreover, *Otter Tail Power Co. v. United States,* 1973, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359, made it clear that even regulation by the FPC does not exempt an electrical utility from prosecution under the antitrust laws. In *Otter Tail,* the Government challenged the defendant's refusal to sell wholesale power to municipalities or even to allow use of its transmission lines to transfer power. The Supreme Court in affirming the lower court's holding for the Government saw no reason to assume an antitrust exemption, nor to defer its decision pending FPC guidance.

The Supreme Court in *Otter Tail,* furthermore, specifically affirmed the part of the District Court's injunction preventing the defendant from entering into or enforcing any contract limiting the areas in which other power companies might sell electrical service. *Id.,* 410 U.S. at 378-79, 93 S.Ct. at 1030, 35 L.Ed.2d at 368-69. Two Circuit Courts also have held that contracts between utility companies providing for territorial divisions are per se Sherman Act violations. *Montana-Dakota Utilities Co. v. Williams Electric Cooperative,* 8 Cir., 1959, 263 F.2d 431; *Pennsylvania Water & Power Co.,* 4 Cir., 1950, 184 F.2d 552, *cert. denied,* 340 U.S. 906, 71 S.Ct. 282, 95 L.Ed. 655. We apply,

[10] In fact, the jury was specifically instructed that the Florida Public Service Commission did not approve any agreement on Gainesville between P&L and Florida Power. R., vol. 26 at 247. On the applicability of the state action immunity doctrine, see *Bates v. State Bar of Arizona,* 1977, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810; *Cantor v. Detroit Edison Co.,* 1976, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141; *Goldfarb v. Virginia State Bar,* 1975, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572; *Parker v. Brown,* 1943, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315. The most recent Supreme Court decision on the doctrine is *City of Lafayette v. Louisiana Power & Light,* 1978, —— U.S. ——, 98 S.Ct. 1123, 55 L.Ed.2d —— (1978).

therefore, the same per se standard in this case to insure that the market is free of territorial restraints.[11]

Conspiracy Or Only Conscious Parallelism?

The crucial issue in this case is whether a conspiracy to divide the market actually exists.[12] No document expressly sets forth a territorial agreement between Florida Power and P&L. However, proof of a conspiracy under § 1 of the Sherman Act does not require the existence of an express agreement. *United States v. Paramount Picture, Inc.*, 1948, 334 U.S. 131, 142, 68 S.Ct. 915, 921, 92 L.Ed.2d 1260, 1285. It is "enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it." *Interstate Circuit v. United States*, 1939, 306 U.S. 208, 226, 59 S.Ct. 467, 474, 83 L.Ed. 610, 620.

P&L argues that Gainesville proved only the existence of consciously parallel business activity, citing numerous cases for the proposition that standing alone such activity does not compel a directed verdict on the charge of conspiracy. As Justice Clark said in his frequently quoted statement, " 'conscious parallelism' has not read conspiracy out of the Sherman Act entirely." *Theatre Enterprises v. Paramount Film Distributing Corp.*, 1954, 346 U.S. 537, 541, 74 S.Ct. 257, 260, 98 L.Ed. 273, 279. P&L claims it

[11] Although it could be argued that retail territorial agreements avoid economic waste by preventing competing power companies from running electric lines to every house, commentators have favored more competition in the sale of power at wholesale to municipal distribution systems. *See* Weiss, *Antitrust in the Electric Power Industry* 135, 170-71 in Promoting Competition in Regulated Industries (A. Phillips ed. 1975); Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 Colum.L.Rev. 64, 120, 125 (1972).

[12] Gainesville does not challenge the trial court's charge to the jury on this issue or on any other issue.

acted solely on the basis of independent business evaluations in refusing service to cities. For example, P&L explains that it refused to consider Chiefland because sixty to seventy miles of high voltage transmission lines would have to be built to serve the city whose population at the time was only about 1,000. Likewise, P&L turned down Lake Helen's request because the company would have to build six miles of line to serve the city, and Winter Haven would have required thirty miles of additional transmission line.

The record, however, indicates much more than just parallel activity. We cannot ignore the continuous exchange of letters between high executives of Florida Power and P&L prior to the events at Gainesville. Although the refusal to serve certain cities may have been influenced by valid economic considerations, the inferences are irresistible that "concerted action was contemplated and invited" by the correspondence. *Interstate Circuit v. United States, supra*, 306 U.S. at 226, 59 S.Ct. at 474, 83 L.Ed. at 620. Indeed, if solid economic reasons existed for refusing service to these cities, there was no reason for communicating with a competitor about the refusal, and certainly not for expressing such decisions in terms of hopeful, if not expected, reciprocity.

This correspondence is a so-called plus factor,[13] which, in addition to parallel activity, points so strongly to the

[13] *Cf. Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 6 Cir., 1962, 308 F.2d 383, *cert. denied*, 1963, 372 U.S. 907, 83 S.Ct. 721, 9 L.Ed.2d 717 (parallel pricing together with evidence of meetings of industry leaders supported conspiracy verdict); *Pittsburgh Plate Glass Co. v. United States*, 4 Cir., 1958, 260 F.2d 397, *aff'd*, 1959, 360 U.S. 395, 79 S.Ct. 1237, 3 L.Ed.2d 1323 (simultaneous announcements of identical price rises subsequent to meeting upheld finding of conspiracy); *Standard Oil Co. v. Moore*, 9 Cir., 1957, 251 F.2d 188, 204-12, *cert. denied*, 1958, 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148 (exchange of information on dealer price cutting, along with parallel practices, supported verdict);

existence of a conspiracy that "reasonable men could not arrive at a contrary verdict . . . ." *Boeing Co. v. Shipman*, 5 Cir., 1969, 411 F.2d 365, 374 (en banc). In fact, the letters and internal memoranda border on a blatant agreement to divide the market.[14]

The text of P&L's brief does not even mention the critical exchange of letters between these ostensible competitors prior to the events at Gainesville. Justification for the "routine" is relegated to a footnote. P&L argues that due to the long standing antipathy between investor owned utilities and the municipal systems, "[e]ach company was interested in whether municipalities it served at franchise were considering 'going municipal.'" P&L then asserts, without giving any example, that "in several instances, the initial contact from the municipality had been by letter showing copies to the other company." It concluded that it was only "common courtesy" to send copies in return.

Oddly enough, P&L's justification for its "routine" letter exchange is dangerously close to an admission that it was common practice for the investor-owned companies to gang up on the municipals. In any event, it is incorrect

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C-O-Two Fire Equipment Co. v. United States, 9 Cir., 1952, 197 F.2d 489, 497, *cert. denied*, 344 U.S. 892, 73 S.Ct. 211, 97 L.Ed. 690 (parallel pricing plus background of illegal licensing agreements, an artificial standardization of the product, and the raising of prices in time of surplus supported jury verdict). *See generally* L. Sullivan, Handbook of the Law of Antitrust 315-19 (1977).

[14] The officials of the power companies deny the existence of a territorial agreement, but "[w]here such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact." *United States v. U. S. Gypsum Co.*, 1948, 333 U.S. 364, 396, 68 S.Ct. 525, 542, 92 L.Ed. 746, 766. *See also United States v. General Motors Corp.*, 1966, 384 U.S. 127, 142 n. 16, 86 S.Ct. 1321, 1328-1329 n. 16, 16 L.Ed.2d 415, 424 n. 16.

that this exchange occurred only when cities were considering going municipal. Chiefland and Lake City, for example, were considering switching from one power company to another.

As for Gainesville, P&L again defends its reluctance to interconnect on economic grounds arguing that the cost would be prohibitive. Gainesville questions the estimate and points out that the higher cost, if any, goes to the terms of the agreement, not whether there should be an offer to interconnect. In any event, in view of the correspondence on other cities, we believe the treatment Gainesville received compels the inference that a continuing conspiracy existed to divide the market.

In 1965, when Florida Power's vice-president wrote P&L requesting comments prior to filing a response to the FPC, he made it clear that his company was inviting cooperation and coordinated action, as had occurred on other cities. Then, when William Clapp, Florida Power's president, wrote the FPC, he specifically opposed any intertie between Gainesville and his company, as well as between the City and P&L, because of the purported territorial agreement, further indicating he expected cooperative action vis-a-vis the City. And knowing full well its cooperation was solicited and indeed was essential, P&L, in its answer to the FPC, failed to disclaim any territorial understanding with Florida Power, and actively supported and cooperated with Clapp by urging that Gainesville negotiate with Florida Power.

Fite even testified at trial that both he and Clapp knew that the agreements on file with the Florida Public Service Commission did not pertain to the Gainesville area.[15] Moreover, Fite said that Clapp's letter had referred to territorial agreements "on file" only to "scare off" the FPC

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[15] R., vol. 19, at 156 ("I knew it, and he knew it").

and Gainesville.[16] One word from P & L would have undone the scheme, and yet, understanding Clapp's purpose and knowing "that cooperation was essential to successful operation of the plan," Fite gave his "adherence to the scheme and participated in it." *Interstate Circuit v. United States, supra,* 306 U.S. at 226, 59 S.Ct. at 474, 83 L.Ed. at 620.

The scenario was repeated the next year when Gainesville approached P&L about an interconnection. Fite first directed Gainesville back to Florida Power: "[A]ny tie with Gainesville should necessarily be one with Florida Power." Px 12. When this approach failed and the City persisted in pursuing an interconnection, Fite pointed out that in his view "three parties are involved," and Gainesville would have to agree to a territorial division at the retail level with Florida Power. Px 14.

P&L contends that Fite's last letter to Kelly, the director of the Gainesville system, did not expressly say that a service area agreement was required. Fite only asked for Kelly's comments on the matter. P&L also argues it never refused to interconnect with Gainesville. We believe, however, that the ambiguous remarks were mere subterfuge. Alan Wright of P&L explained, in an internal memorandum to Fite:

> [M]y impression from Mr. Kelly's comments [in his letter of October 10] is that he is only trying to secure some kind of commitment from us which could prove not only embarrassing to Florida Power Corporation but would also "put us in a box". In other words, any type of definitive reply on our part would only be used as a club.

Px 412. Thus, P&L resisted giving a "definitive reply" out of its desire to help Florida Power. Although such a desire is admirable between friends, it is highly suspicious between competitors.

Furthermore, the concentration of the electric power industry in Florida supports our holding that a conspiracy to divide the market existed. Besides P&L and Florida Power, the City Commission discussed four other interconnection possibilities, but for all practical purposes, the two largest electric power companies in Florida were the only real alternatives. Indeed, P&L argues that Florida Power was the sole practical choice.[17]

We realize that some courts have been reluctant to find a conspiracy in such a concentrated market.[18] but the Su-

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[16] During trial, Fite testified:

> I think [Clapp] is honest, but I think—I think he thought may be that might scare him a little bit, see.
>
> • • • • • •
>
> Q. You think he put that reference to 'on file' in there perhaps to scare off Gainesville or the Federal Power Commission or somebody?
>
> A. That's my opinion.

R., vol. 19, at 154-55.

[17] The City Commission had discussed Clay Electric Cooperative, Starke's municipal system, Jacksonville's municipal system, and the Yankee-Dixie organization, which was an abortive attempt to interconnect all municipal systems. R., vol. 6, at 75 (testimony of Commissioner Richardson); R., vol. 18, at 163 (testimony of Commissioner Turlington). Clay Electric and Starke, however, were too small to give Gainesville any help on an interconnection. Clay, also, was already interconnected to Florida Power, and if that company would not sell power to Gainesville it was unlikely it would sell to Gainesville through Clay. *Id.* Jacksonville's lines were farther from the City than either P&L or Florida Power. However, John Kelly, director of the Gainesville system, had suggested that if Gainesville could interconnect with P&L then power could be transferred from Jacksonville to Gainesville since P&L and Jacksonville were interconnected. Px 5 at 4.

[18] *See, e. g., Delaware Valley Marine Supply Co. v. American Tobacco Co.,* 3 Cir., 1961, 297 F.2d 199, 202, *cert denied,* 369 U.S.

preme Court, in determining if the exchange of price information was illegal, has considered whether an industry was "dominated by relatively few sellers." *United States v. Container Corp. of America,* 1969, 393 U.S. 333, 337, 89 S.Ct. 510, 512, 21 L.Ed.2d 526, 527. Economists recognize that when a market is concentrated it is easier to coordinate collusive behavior. E. g., F. Scherer, Industrial Market Structure and Economic Performance 183-86 (1970). To establish a market division among fifty firms, for example, a written document may be necessary. But when only two companies dominate a market, it is unlikely any formal agreement is needed or would be risked. In a concentrated market, therefore, we believe a court should carefully scrutinize firms to see if their conduct or any communication among them supports or requires a finding of conspiracy. *See generally* Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach,* 21 Stan.L.Rev. 1562 (1969). In this case, the incriminating correspondence between the two largest electric power companies in Florida warrants such a finding.[19]

What's Open On Remand

Gainesville, in addition, argues that the trial court's denial of a judgment n. o. v. should be reversed on its § 1 claim that an understanding existed between P&L and

839, 82 S.Ct. 867, 7 L.Ed.2d 243 ("we are aware of the difficulties of proof of modern antitrust conspiracy and that the difficulties increase as the number of conspirators lessens").

[19] We do not reach the question of whether the interdependence of firms, i. e., decision making based on the anticipated reactions of other firms in an oligopolistic market, is sufficient to constitute a violation of § 1. *See Bogosian v. Gulf Oil Corp.*, 3 Cir., 1977, 561 F.2d 434, 444-47, *cert. denied*, 1978, —— U.S. ——, 98 S.Ct. 1280, 55 L.Ed.2d ——. We hold only that where a market is dominated by a small number of sellers collusion is easier, and a court should examine the market with a more careful eye.

Florida Power whereby neither would interconnect with Gainesville unless the City would enter into a retail territorial agreement. We sustain, however, the trial court's refusal to grant judgment n. o. v. on this issue, and on remand, questions 3 and 4 are foreclosed. See Appendix.

As an anchor windward, Gainesville also does not abandon its mild suggestion that judgment n. o. v. should have been granted on its § 2 attempt to monopolize argument based on the asserted imposition of a retail territorial restriction as a condition of interconnection. But with respect to the sufficiency of the evidence, we find no basis to reverse on this issue. Thus, on remand, questions 8 thru 14 are foreclosed. See Appendix. We also point out that the jury's negative answer to question 8, which we sustain, does not prevent reconsideration of the § 1 claim on the existence of an understanding to divide the wholesale power market. With meticulous care, the trial court instructed the jury that questions 8 to 14 pertained to the completely different § 2 monopoly theory of liability. Gainesville claimed under this theory that the specific act which furthered the attempt to monopolize was P&L's alleged refusal to interconnect unless Gainesville agreed to a retail territorial agreement. See Appendix (Question 9). This contention is unrelated to the existence of a conspiracy to divide the wholesale power market.

Finally, Gainesville contends it should be granted a new trial on all issues because three prospective jurors should have been excused for cause; the trial judge made prejudicial remarks; and certain testimony was erroneously admitted. We find, however, no basis independent of the jury's verdict to reverse on these grounds.

In sum, we base our reversal solely on the existence of an "agreement, understanding or concert of action" between P & L and Florida Power whereby P&L would not deal with Gainesville because the City was in Florida Power's territory. On remand, the issue reflected in question 2

on whether the territorial agreement was a significant factor in Gainesville's not having obtained an interconnection is still open, as are the damage issues reflected in questions 5, 6, and 7.

REVERSED and REMANDED.

APPENDIX

The fourteen special verdict questions, along with the instructions and the jury's answers, are as follows:

1. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT THERE WAS AN AGREEMENT, UNDERSTANDING OR CONCERT OF ACTION BETWEEN POWER & LIGHT AND FLORIDA POWER WHEREBY POWER & LIGHT WOULD NOT DEAL DITH GAINESVILLE THROUGH AN INTERCONNECTION BECAUSE GAINESVILLE WAS IN FLORIDA POWER'S SERVICE TERRITORY?

   Answer by writing Yes or No. [*No*] If your answer is *No*, do not consider or answer question 2, but instead proceed to question 3 which you shall answer. If your answer is *Yes*, proceed to question No. 2.

2. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT THE AGREEMENT, UNDERSTANDING OF CONCERT OF ACTION BETWEEN POWER & LIGHT AND FLORIDA POWER WAS A SUBSTANTIAL FACTOR IN GAINESVILLE'S NOT HAVING OBTAINED AN INTERCONNECION?

   Answer by writing Yes or No. ——— Whatever your answer, proceed to question No. 3. If your answer is *Yes*, you will proceed to question 5 in addition to question 3.

3. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT THERE WAS AN AGREEMENT, UNDERSTANDING OR CONCERT OF ACTION BETWEEN POWER & LIGHT AND FLORIDA POWER WHEREBY NEITHER WOULD INTERCONNECT WITH GAINESVILLE UNLESS THE CITY WOULD ENTER INTO A TERRITORIAL AGREEMENT?

   Answer by writing Yes or No. [*No*] If your answer is *No*, and your answer to question 1 or 2 is also *No*, do not consider or answer questions 4 through 7, but, instead, proceed to question 8 which you shall answer. If your answer to question 3 is *Yes*, proceed to question 4.

4. DO YOU FIND A PREPONDERANCE OF THE EVIDENCE THAT THE AGREEMENT, UNDERSTANDING OR CONCERT OF ACTION BETWEEN POWER & LIGHT AND FLORIDA POWER WAS A SUBSTANTIAL FACTOR IN GAINESVILLE'S NOT HAVING OBTAINED AN INTERCONNECION?

   Answer by writing Yes or No. ——— If your answer to this question is *No, and* your answer to question 1 or 2 is *No*, do not consider or answer questions 5 through 7, but, instead, proceed to question 8 which you shall answer. However, if your answer to question 2 or 4, or both, is *Yes*, proceed to question 5 which you shall answer.

5. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT NOT HAVING OBTAINED AN INTERCONNECTION AGREEMENT AT ANY TIME PRIOR TO APRIL 1, 1968 WAS A SUBSTANTIAL FACTOR IN THE DECISION OF THE GAINESVILLE CITY COMMISSION TO INSTALL

A 76MW UNIT INSTEAD OF A 94MW REHEAT UNIT?

Answer by writing Yes or No. _____ If your answer is *Yes*, proceed to questions 6 and 7. If your answer is *No*, do not consider or answer questions 6, but instead, proceed to question 7.

6. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT GAINESVILLE SUFFERED ANY DAMAGES AS A RESULT OF INCREASED FUEL COSTS BECAUSE IT INSTALLED THE 76MW UNIT INSTEAD OF THE 94MW REHEAT UNIT AND, IF SO, WHAT IS THE AMOUNT OF ITS DAMAGES FOR SUCH INCREASED COSTS? $———.

7. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT GAINESVILLE SUFFERED ANY DAMAGES, EXCLUSIVE OF ANY INCREASED FUEL COSTS, AND, IF SO, WHAT IS THE AMOUNT OF DAMAGES? $_____.

Proceed to question No. 8.

8. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT GAINESVILLE SOUGHT AN INTERCONNECTION FROM POWER & LIGHT?

Answer by writing Yes or No. [*No*] If your answer is *No*, do not consider or answer any further questions. If your answer is *Yes*, proceed to question 9.

9. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT POWER & LIGHT REFUSED TO INTERCONNECT WITH GAINESVILLE WITHOUT A TERRITORIAL AGREEMENT?

Answer by writing Yes or No. ——— If your answer is *No*, do not consider or answer any further questions. If your answer is *Yes*, proceed to question 10.

10. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT POWER & LIGHT, AT THE TIME IT REFUSED INTERCONNECTION, WAS ATTEMPTING TO MONOPOLIZE THE SALE AND DISTRIBUTION OF ELECTRIC POWER IN A RELEVANT MARKET?

Answer by writing Yes or No. ——— If your answer is *No*, do not consider or answer any further questions. If your answer is *Yes*, proceed to question 11.

11. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT POWER & LIGHT'S REFUSAL TO INTERCONNECT WAS IN FURTHERANCE OF ITS ATTEMPT TO MONOPOLIZE?

Answer by writing Yes or No. ——— If your answer is *No*, do not consider or answer any further questions. If your answer is *Yes*, proceed to question 12.

12. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT NOT HAVING OBTAINED AN INTERCONNECTION WITH POWER & LIGHT AT ANY TIME PRIOR TO APRIL 1, 1968 WAS A SUBSTANTIAL FACTOR IN THE DECISION OF THE GAINESVILLE CITY COMMISSION TO INSTALL A 76MW UNIT INSTEAD OF A 94MW REHEAT UNIT?

Answer in writing Yes or No. ——— If your answer is *Yes*, proceed to questions 13 and 14. If your answer is *No*, do not consider or answer questions 13 and 14.

13. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT GAINESVILLE SUFFERED ANY DAMAGES AS A RESULT OF INCREASED FUEL COSTS BECAUSE IT INSTALLED THE 76MW UNIT INSTEAD OF THE 94MW REHEAT UNIT AND, IF SO, WHAT IS THE AMOUNT OF ITS DAMAGES FOR SUCH INCREASED FUEL COSTS. $———.

14. DO YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT GAINESVILLE SUFFERED ANY DAMAGES, EXCLUSIVE OF ANY INCREASED FUEL COSTS, AND, IF SO, WHAT IS THE AMOUNT OF SUCH DAMAGES? $———.

APPENDIX B

[Caption deleted in printing]

July 28, 1978.

Appeal from the United States District Court for the Middle District of Florida; Gerald B. Tjoflat, Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion May 22, 1978, 5 Cir., 573 F.2d 292).

Before BROWN, Chief Judge, GODBOLD, Circuit Judge, and MEHRTENS*, District Judge.

PER CURIAM:

The opinion of the panel, appearing at 573 F.2d 292, is amended by deleting in the third paragraph on page 302 the fourth sentence and part of the fifth sentence prior to the quotation and substituting the following: "That the ambiguous reply was a mere subterfuge is demonstrated by the explanation given by Alan Wright of P & L in an internal memorandum to Fite:"

The petition for rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc is DENIED.

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* Senior District Judge of the Southern District of Florida sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Civil Action No. 68-305-Civ-J

GAINESVILLE UTILITIES DEPARTMENT and CITY OF GAINESVILLE, FLORIDA, *Plaintiffs*,

-VS-

FLORIDA POWER AND LIGHT COMPANY, *Defendant*.

FINAL JUDGMENT ON JURY VERDICT

This action having come on for trial before the Court and a jury, the Honorable Gerald Bard Tjoflat, District Judge, presiding and the issues having been duly tried and the jury having duly rendered its verdict on the 7th day of August, 1975, by answers to special questions and the jury having found the defendant, Florida Power & Light Company, not guilty by negative answers to special questions 1, 3 and 8,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiffs, Gainesville Utilities Department and City of Gainesville, Florida take nothing, that the action be dismissed with prejudice on the merits, and that the defendant, Florida Power & Light Company, recover of the plaintiffs its cost of action.

Dated at Jacksonville, Florida, this 13th day of August, A. D. 1975.

/s/ GERALD BARD TJOFLAT
Judge

APPENDIX D

U.S. Const., Amend. VII:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Sherman Act, § 1, 15 U.S.C. § 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Sherman Act, § 2, 15 U.S.C. § 2:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Federal Power Act, § 202(b), 16 U.S.C. § 824a(b):

> "Whenever the Commission upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided,* That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them."

FILED
OCT 23 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-476

FLORIDA POWER & LIGHT COMPANY, *Petitioner*

v.

GAINESVILLE UTILITIES DEPARTMENT AND CITY OF GAINESVILLE, FLORIDA, *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENTS GAINESVILLE UTILITIES DEPARTMENT AND CITY OF GAINESVILLE IN OPPOSITION

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF RESPONDENTS GAINESVILLE UTILITIES DEPARTMENT AND CITY OF GAINESVILLE IN OPPOSITION

Respondents, Gainesville Utilities Department and City of Gainesville (hereafter referred to collectively as "Gainesville" or "the City") respectfully submit that the Court should deny the Petition for Writ of Certiorari filed on 20 September 1978 by Florida Power & Light Company (hereafter "FPL").

QUESTION PRESENTED

The only question properly raised and presented is whether the court of appeals erred in concluding that undisputed facts of record entitled Gainesville to judg-

ment n.o.v. on the limited issue of whether FPL had combined or conspired with Florida Power Corporation to allocate territories.

STATUTE INVOLVED

This case involves § 1 of the Sherman Act, 15 U.S.C. § 1, which is reproduced in Appendix D to the Petition. The case does not present any genuine issue under either the Seventh Amendment or § 202 of the Federal Power Act, 16 U.S.C. § 824a.

STATEMENT OF THE CASE

The facts are set forth comprehensively in Chief Judge Brown's opinion for a unanimous court of appeals, reported at 573 F. 2d 292 (5th Cir. 1978) and reprinted in Appendix A to the Petition. We wish to note only a few points relating to the jury's verdict and the scope of the decision below.

After settling with Florida Power Corporation (hereafter "Florida Power"), the City went to trial against FPL on three theories: a combination or conspiracy between FPL and Florida Power to divide territories; a combination or conspiracy between the two companies not to interconnect unless the City consented to a territorial agreement; and an attempt by FPL to monopolize. The combination or conspiracy charges were brought pursuant to § 1 of the Sherman Act, 15 U.S.C. § 1, and the attempt charge pursuant to § 2, 15 U.S.C. § 2.

The case went to the jury on 14 special interrogatories. Petitioner incorrectly states that "the jury found for FPL on all 14 of the special verdicts. . . ." Petition at 4-5. In fact, the jury answered only 3 because negative answers to these questions disposed of the City's charges. The jury never reached the remaining 11 questions, which related primarily to the unresolved issues of injury, causation, and damages. *See* App. A at 13a-14a and n.9.[1]

On appeal, a unanimous court held that Gainesville was entitled to judgment n.o.v. on the existence of a combination or conspiracy between FPL and Florida Power to allocate territories, but upheld the jury's verdict in favor of FPL on both of the other charges. The court remanded for trial to determine whether the allocation had caused the City any injury, and if so, the amount of any damages. *See* App. A at 22a-24a.

FPL petitioned for rehearing and rehearing en banc on the ground that the court had denied FPL its constitutional right to a jury trial. FPL did not raise any issue under the Federal Power Act either in its rehearing petition or in the original briefing. Rehearing was denied, along with FPL's request for rehearing en banc. *See* App. B to the Petition.

REASONS FOR DENYING THE WRIT

The Petition purports to present three questions. The first two are merely different ways of camouflaging a request that this Court review the evidence. The third amounts to a nebulous plea that the Court reconsider —to what end is unclear—its decisions in *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973) and *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976). This point was not raised below, is not present in the case in any event, and would not be worthy of this Court's consideration if it were.

---

[1] The opinion of the court of appeals, reprinted as Appendix A to the Petition, will be cited throughout this Brief as "App. A."

I. The Lower Court's Grant of Judgment n.o.v. on the Existence of a Combination or Conspiracy to Allocate Territories Presents no Question of General Importance Requiring Review by this Court

The only genuine issue raised by the first two of FPL's questions is whether the court of appeals erred in concluding that the evidence required judgment n.o.v. That question obviously is of no general importance or precedential value and turns wholly upon the facts of the case. Certiorari will not be granted, however, to review and evaluate evidence. *See, e.g., General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178, *aff'd on rehearing*, 305 U.S. 124 (1938); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

FPL tries an end-run around this Court's settled practice by characterizing the judgment as a deprivation of its constitutional right to trial by jury. *E.g.*, Petition at 2, 3, 10, 11, 14. FPL does not claim that judgment n.o.v. is always and as a matter of law a violation of the Seventh Amendment. On the contrary, it recognizes (Petition at 14) that judgment n.o.v. may be appropriate in any given case.[2] FPL argues only that it is not appropriate in *this* case. This constitutional window-dressing is not original with FPL; petitioners routinely and unsuccessfully have sought certiorari by characterizing judgment n.o.v. or a directed verdict as violations of the Seventh Amendment. *See, e.g., England* v. *Chrysler Corp.*, 419 U.S. 869 (1974); *Cartrade* v. *Ford Dealers Advertising Association*, 405

[2] As this Court pointed out in *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967), "[T]here is no constitutional bar to an appellate court granting judgment n.o.v."

U.S. 997 (1972) (directed verdict); *Brown* v. *Lamb*, 397 U.S. 907 (1970); *Manaia* v. *Potomac Electric Power Co.*, 361 U.S. 913 (1959).[3]

FPL next asserts that the court of appeals held that proof of parallel business activity together with "any" additional evidence of coordination "compels" or "requires" a finding of concerted action. Petition at 10, 15, 18. The court, of course, nowhere suggested such a simplistic approach; it held only that the overwhelming evidence *in this case* compelled a finding of concerted action.[4]

To attack this decision, FPL resorts to conclusory assertions while ignoring the mass of undisputed evidence of concerted action with respect to Gainesville and other systems that sought to deal with FPL or Florida Power. FPL's paraphrase of the evidence relating to Chiefland and other Florida cities is illustrative. It discusses these incidents (Petition at 15-16) without mentioning that FPL and Florida Power coordinated their refusals to serve and exchanged ex-

[3] FPL is on both sides of the question. In opposing certiorari in *Manatee Cablevision Corp.* v. *Florida Power & Light Co.*, No. 78-247, FPL urged successfully that a challenge to judgment n.o.v. in a § 1 Sherman Act case does not raise any real constitutional question, and presents nothing more than a routine request that the Court review the evidence. *See* Brief of Respondent Florida Power & Light Company in Opposition at 8-9. Certiorari was denied on October 10, 47 U.S.L.W. 3246.

[4] FPL's suggestion that this distinction was lost on the court of appeals reflects the poverty of FPL's position. The cases involving "plus" factors were cited in footnote 13 to the court's opinion (App. A at 17a-18a) to illustrate the kinds of evidence that might take a case beyond mere parallel action, not for the proposition that any additional circumstantial evidence will compel a finding of concerted action.

press assurances of reciprocal treatment.[5] Compare, by way of contrast, the opinion of the court of appeals. *See* App. A at 8a-13a.[6] Similarly, in dealing with events at Gainesville, FPL ignores the collaboration between FPL and Florida Power in fashioning their responses to the inquiries by the Federal Power Commission, and FPL's cooperation with Florida Power in forcing a territorial agreement upon the City. The court's opinion again presents a vivid contrast. *See* App. A at 4a-7a, 19a-20a.

FPL also attempts to inject a false credibility issue by referring to the trial court's caustic comments about Gainesville's witnesses. Petition at 6-7. The judgment n.o.v., however, was not based even in part upon the testimony of these witnesses. The comments, and others that the trial court made, were relevant not to the territorial allocation issue, but to Gainesville's contention on appeal that the trial judge, by his open advocacy of the defense and hostility toward the City and its witnesses, had deprived the City of a fair trial and was responsible for the aberrational jury verdict.

FPL, in another misdirection play, tries to make this a "motive and intent" case by asserting that its actions vis-a-vis Gainesville and the other systems with which

[5] Nor were communications between the companies always after the fact as FPL asserts at pp. 5, 6 of the Petition. *See, e.g.*, App. A at 9a-13a. Indeed, in the case of Lake City, Florida Power's refusal was even cleared in advance between the companies over the phone. *See* App. A at 10a. FPL's president, Mr. Fite, admitted that this was "routine practice." T. 19 at 110.

[6] FPL tried the same technique in the court of appeals. As the court noted: "The text of P&L's brief does not even mention the critical exchange of letters between these ostensible competitors. . . ." App. A at 18a.

it declined to deal resulted from FPL's judgment regarding its best business interests and not from the territorial allocation. *See* Petition at 5-6, 15-16. The issue, however, as properly stated by the court of appeals (App. A at 16a), was whether an arrangement regarding territories existed, not whether it "caused" any particular refusal to deal. FPL's argument goes, if anywhere, to the issues of causation and injury, which remain to be tried.[7]

We have not reviewed here the evidence relating to the territorial allocation issue; the court of appeals has done that in its exhaustive opinion. It is sufficient to note that the evidence of concerted action is far stronger than the evidence that this Court found made out a combination or conspiracy as a matter of law in *Albrecht* v. *The Herald Co.*, 390 U.S. 145, 149 (1968).[8]

[7] FPL suggests parenthetically that the court should have remanded for consideration of a new trial on the territorial allocation issue. Petition at 12-13. This point obviously has nothing to do with FPL's "questions presented" and is of no significance apart from this case. FPL, moreover, never raised this point below and offers no justification for a new trial. The territorial issue was fully litigated, and the court was not obliged sua sponte to remand for consideration of a new trial. *See Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 329-30 (1967). In *Iacurci* v. *Lumnus Co.*, 387 U.S. 86 (1967) (per curiam), cited by FPL, the new trial point had been timely raised and related to issues that had not been resolved by the jury rather than to the issue on which n.o.v. was granted.

[8] *See also United States* v. *Container Corp. of America*, 393 U.S. 333, 335 (1969) (furnishing competitor with price information with "expectation" of reciprocal treatment constitutes combination or conspiracy).

II. This Case Presents no Occasion for Reconsidering the Decisions in *Otter Tail* and *Cantor*

In *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), this Court rejected a claim that Section 202 of the Federal Power Act, 16 U.S.C. § 824a, impliedly repealed the antitrust laws in the case of a refusal to interconnect and wheel power. *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), involved a claim that, under the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), state regulatory approval of a tariff gave antitrust immunity to a "free" light bulb policy that the company had incorporated into its tariff.

FPL's unfocused request (Petition at 19-21) that the Court reconsider these decisions suffers from a number of fundamental infirmities. To begin with, FPL never argued in the court of appeals that either the Federal Power Act or state regulatory approval immunized the territorial division.[9] We are dealing with afterthoughts that are not properly raised here. *See, e.g., Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967); *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958); *California* v. *Taylor*, 353 U.S. 553, 556 n.2 (1958). And FPL never so much as suggests what a reappraisal of *Otter Tail* and *Cantor* might mean for the instant case, or why, even in the abstract, reconsideration is required or desirable.

The case does not present these issues in any event. There is no issue of state regulatory approval because the territorial allocation in question had not been approved by any regulatory body. This was duly noted by the court of appeals, along with the district court's dispositive charge on the precise point. *See* App. A at 15a. Even FPL ultimately concedes that *Cantor* has nothing to do with the instant case. *See* Petition at 20 ("None of the issues presented here was resolved by the Court's subsequent opinion in *Cantor*. . . .").

[9] The Federal Power Act was not even cited in either FPL's brief or petition for rehearing.

Nor does the case present even a theoretical "immunity" issue under *Otter Tail* and the Federal Power Act. We are concerned here with a horizontal division of territories between competitors and not with purely unilateral conduct. Indeed, Justice Stewart, in the dissenting opinion upon which FPL relies so heavily, noted repeatedly that his contention regarding "implied repeal" did not extend to such a horizontal combination. *E.g.*, 410 U.S. at 391 ("in the absence of horizontal conspiracy"). *See also id.* at 387 n.5, 390 n.7.

CONCLUSION

The decision below was notable for the court's sensitivity to the record and respect for the verdict. After "an extensive review of the record" (App. A at 1a), the court sustained all but one of the jury's verdicts and carefully remanded for retrial the unresolved issues of injury, causation, and damages. With respect to the single issue of concerted action to allocate territories, the court concluded in a reasoned and comprehensive opinion that there was no substantial conflict in the evidence and n.o.v. was proper. We submit that FPL has demonstrated no compelling reason why this Court should review that decision, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-476

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v.

GAINESVILLE UTILITIES DEPARTMENT AND CITY OF GAINESVILLE, FLORIDA, *Respondents*.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I.

Contrary to respondents' argument, this case squarely presents an opportunity for the Court to examine the continuing significance and implications of its important and far-reaching decision in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973).

The Court of Appeals in this case declined to accord any weight to the pervasive federal and state regulatory framework within which petitioner and other electric utilities must operate. It specifically ruled that the same antitrust standards apply in the electric power industry as in industries which are subject to no governmental regulation. The court's conclusions were expressly premised upon this Court's decision in *Otter Tail*, in which four members of the Court, with three

Justices dissenting, held that the Federal Power Act does not exclude issues of interconnection from scrutiny under the antitrust laws. (Pet., App. A 15a). Respondents' suggestion that *Otter Tail* has nothing to do with this case—which also arises as a result of requests for interconnection—is untenable.

In the specific circumstances of this case, two principal issues are presented as to the relevance of the pervasive regulatory structure created by Congress and the states for the electric power industry: Is that structure to be totally ignored in determining whether two neighboring electric utilities, in response to essentially the same economic and regulatory considerations, have merely engaged in parallel but independent conduct or whether instead they have acted pursuant to agreement; and is that structure to be totally ignored in determining the antitrust standards under which the reasonableness of the activities of electric utilities is to be judged? These issues, which were injected into the case by the Court of Appeals and are directly presented by its opinion, are of significance to the entire electric power industry. The opinion below thus offers an opportunity for this Court to give plenary consideration to the proper accommodation of the antitrust laws and the regulatory requirements governing electric utilities, and to reexamine the decision in *Otter Tail*, which represents the views of less than a majority of this Court.

II.

Petitioner agrees, as respondents point out, that this Court does not sit merely to evaluate the evidence in particular cases. It is, however, entirely appropriate for the Court to consider whether the court below disregarded established principles governing the respect

due jury verdicts and to confirm the proper limits of appellate review of such verdicts. Such consideration can be given only in the context of a case such as this one.

The Court of Appeals here rejected the jury's special verdict, rendered after a two-month trial on the basis of instructions that were "a model of perfection" (Pet., App. A 2a n.3), that there was no wholesale service agreement between petitioner and Florida Power Corporation. The court also rejected the denial by an experienced trial judge of judgment n.o.v., and concluded that the jury was "compel[led]" to find such an unlawful agreement. (Pet., App. A 2a).

In determining that the jury and the trial judge erred in their evaluation of the evidence, the Court of Appeals relied almost exclusively on its assessment of a limited number of documents in the trial record. There is no indication in the Court of Appeals' opinion that it gave any consideration to the extensive testimony in the record regarding those documents, which showed that petitioner's conduct resulted not from any agreement but rather from its own evaluation of pertinent business considerations. That testimony obviously was accepted by the jury, and presumably formed the basis of the trial court's rejection of judgment n.o.v. Nor is there any indication that the Court of Appeals gave any weight to important issues of credibility that the trial judge recognized were presented by the testimony heard by the jury.[1]

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[1] The trial judge's sidebar comments regarding the credibility of respondents' witnesses encompassed one of the authors of the correspondence relied upon by the Court of Appeals. (*See* Pet. 6-7; App. A 4a-7a). Respondents are thus in error in asserting (Br. 6) that the credibility of this witness did not bear upon the territorial allocation issue that was resolved by the jury in petitioner's favor.

The Court of Appeals usurped the functions of the jury in this case. In rejecting the jury's verdict, the court engaged in its own assessment of the evidence and resolved disputed factual issues. This Court should review the Court of Appeals' decision in order to re-establish that an appellate court may overturn a jury verdict "only when there is a complete absence of probative facts to support the conclusion reached . . .," *Lavender* v. *Kurn,* 327 U.S. 645, 653 (1946), a standard plainly not met in this case.

* * *

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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